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Thirty-fifth session

Summary record of the 747th meeting
Held at Headquarters, New York, on Friday, 21 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.2)

1. **Mr. Sekolec** (Secretary of the Commission), summarizing the most recent changes to the draft Model Law, said that a definition of "conciliator" had been added to article 1. Articles 5 and 6, as they appeared in the annex to document A/CN.9/506, were to be merged as article 5 under a new title "Number and appointment of conciliators".

2. In the italicized text of the new article 14 (former article 15), contained in document A/CN.9/XXXV/CRP.2, "may insert" had replaced the word "inserts" in the earlier text. Extensive discussion of the phrase "binding and enforceable" had revealed that those concepts were not interpreted uniformly in enacting States. In some regimes, "binding and enforceable" were qualities which characterized any type of contract, whereas elsewhere, the expression had an executory connotation, suggesting that a plaintiff could go directly to an official charged with enforcing judgements or awards.

3. In the former article 15 (A/CN.9/506, annex), some delegations considered the mention of the word "sign" to be superfluous as there was no requirement, for instance under common law, that a settlement agreement should be signed. It was therefore decided that the words "reach and sign" should be replaced with "conclude".

4. **The Chairman** recalled that during earlier informal consultations a few delegations had insisted that the requirement of a signature should appear in the text of the draft Model Law. In the same vein, other participants had attached great importance to the concept of "binding and enforceable". He urged the Working Group to express their opinions on both the inclusion of "enforceable" and on the requirement that the agreement should be signed.

5. **Mr. Morán Bovio** (Spain) said he agreed that delegations which had been involved at earlier stages of negotiation should provide clarification on the genesis of article 15, specifically with respect to discussions held on the signing of the agreement and on the concepts of enforceability or executability.

6. **Mr. Lebedev** (Russian Federation) said that in earlier discussions it had been considered useful to retain the concept of enforceability, along with the term "binding". It could be debated that "enforceable" might not be the most appropriate legal terminology but, in the opinion of those delegations which favoured its retention, the term would be useful to States enacting national laws based on the draft Model Law and would enable them, at their discretion, to establish special provisions and rules to ensure "enforceability" of such settlement agreements.

7. He fully agreed that the provision on "enforceability" and, by extension, the ability to implement settlement agreements were ultimately the goals of conciliation proceedings. He believed the term should not be replaced, nor was it rational to raise the issue of excluding it.

8. **Mr. García Feraud** (Observer for Ecuador) said that the discussion on the deletion of the word "sign" hinged on differences of interpretation between judicial systems. In some regimes, signature was regarded as extremely important, and it enabled a process to advance on the basis of an instrument that was executory in nature. It was however very difficult to reconcile various judicial systems which had evolved from different roots in resolving the same issues. In order to alleviate the concerns raised he suggested the following wording: "The settlement agreement should be signed if this is necessary in order to ensure its enforceability in respective judicial systems."

9. **Mr. Sekolec** (Secretary of the Commission) said that, as currently formulated, the suggestion might be appropriate for a treaty or guide to enactment, but not for a national law, which could not include wording to the effect that the agreement should be signed "if necessary".

10. **Mr. Tang** Houzhi (China) said that signature of a document was very important in Chinese law on procedure and arbitration. However, under contract law, contracts which had been concluded orally were equally valid and there was no requirement for a contract to be signed. Such conflicts existed in Chinese legislation. Since the draft Model Law was intended to operate internationally, his delegation believed that the word "conclude" would be appropriate.

11. As for the use of the expression "binding and enforceable", he said that "binding" referred to an effect on parties, whereas "enforceable" related to whether an agreement could be enforced by a court. A settlement agreement would naturally carry binding effect, but would not necessarily be enforceable. A party to a contract might choose not to implement the terms of the agreement, and if the case were brought before a court, that court would need to investigate whether a breach had been committed. If a settlement agreement were not enforceable, parties would question the usefulness of recourse to a conciliator, rather than to a court. The word "enforceable" was quite appropriate and reflected the opinions of most delegations during the discussions of the Working Group. The former article 15 itself, as contained in document A/CN.9/506, was applicable to a number of situations and could therefore be usefully retained.

12. **Mr. Graham** (Mexico) agreed that the interpretation of the expression "binding and enforceable" differed among legal systems and said that the expression agreed upon should take into consideration either a broad defence for the party against which enforcement is being sought, or a more limited defence. Based on the experience of serious proposals put forward by delegations, it was probably not possible to reach agreement on the wording at the beginning of the former article 15, as legislative differences created stumbling blocks for such agreement.

13. In the absence of a compromise, his delegation suggested that any party could present agreements before a judge seeking enforcement. To that end, he proposed the following text: "If the parties reach [and sign] an agreement settling a dispute, any of the parties is entitled to submit the agreement before a court for its enforcement." In the draft Guide to Enactment the Working Group would indicate possible defences and the types of procedure involved.

14. **Ms. Beleva** (Observer for Bulgaria) said she agreed with the Observer for Ecuador that the reference to signing should be retained, since in some legal systems, a written agreement was a *sine qua non*. Although many States had entered reservations in that connection to the United Nations Convention on Contracts for the International Sale of Goods, the Commission was drafting a model law, not a convention, and flexibility was thus of the essence. A reference to national legal systems could be included in the Guide, and it would thus be for legislators to determine how best to ensure enforceability.

15. **Ms. Mangklatanakul** (Thailand) said that Thai contract law mostly required a signature, whether handwritten or electronic. She would thus be in favour of retention of the reference to signing, whether in the formulation "conclude and sign where necessary", in an explanatory footnote, or in the Guide.

16. **Mr. Barsy** (Sudan) said that he would not object to deletion of the word "sign", since it would still be for the State to determine the conditions for enforceability. It was important to recall that other national laws might also be applicable. If a conciliation agreement required enforcement by a court or tribunal, a number of problems would arise, not least if one of the parties had reached the agreement by fraudulent means. A conciliation agreement submitted to a judge would, moreover, be treated as would any contract between the parties, thus reducing the usefulness of the Model Law.

17. **Mr. Cosman** (Canada) said he agreed with the representative of China that signing provided important proof that a settlement agreement had been reached. However, his delegation favoured the term "conclude", since it was important not to limit States in whose jurisdictions oral agreements were also binding. Although the representative of Mexico had described one possible means of enforcing an agreement, his proposed formulation should be placed in square brackets. The enacting State would then be left to determine the precise modalities.

18. **Mr. Heger** (Germany) said that he fully supported the Mexican proposal, since it allowed States to decide the question of enforcement, a matter normally governed by national law.

19. **Mr. Markus** (Observer for Switzerland) said that translation of the term "enforceability" was not the only problem; the issue was further complicated by the multiplicity of procedures for enforcement that existed in different countries. Since enforceability was ultimately determined by national law, his delegation could, however, accept a degree of ambiguity in the provision. The formulation proposed by the representative of Mexico was acceptable, provided the term "enforcement" rather than "execution" was used. As for the formulation proposed by the Observer for Ecuador, it might also be included in square brackets,

provided the word "ensure" was replaced with the idea of supporting or strengthening.

20. **The Chairman** said that national legal systems had different mechanisms for enforcement, and the terminology problem made standardization virtually impossible. In some systems, the word "enforceable" was synonymous with "binding"; in others, it implied enforcement by a court or arbitral tribunal. He suggested that the meeting should be suspended for informal consultations.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

21. **Mr. Sekolec** (Secretary of the Commission), summarizing the outcome of the informal consultations, said that various approaches to drafting the provision had been suggested.

22. One approach was that even if an effort was made to improve the translation of "binding and enforceable", those concepts would inevitably assume different connotations within different legal systems. That fact could, however, be explained in the Guide, on the understanding that it would be for the legislators to determine the precise meaning of article 15.

23. It was undisputed that in many legal systems, a settlement agreement could be in any form in order for it to be binding and enforceable. Reference had been made to sales contracts, which could also be concluded in any form. Significantly, States that had entered a reservation to the United Nations Convention on Contracts for the International Sale of Goods to the effect that sales contracts must be in written form were in the minority. Moreover, such reservations did not require that the sales contract must be signed. It had also been pointed out that in some legal systems, depending on the content of the enforceability, a signature might be required.

24. A compromise formulation would read as follows: "If the parties conclude an agreement settling a dispute", with an explanation included in the Guide to the effect that in some legal systems there were form requirements and gradations of those form requirements, with a signature requirement in some cases.

25. **Ms. Brelier** (France) said that the first sentence of article 15 should remain unchanged. The formulation proposed by the representative of Mexico might constitute the second sentence.

26. **The Chairman** said that the proposed formulation would be submitted to the drafting group for consideration, on the understanding that it would be included in square brackets.

27. *It was so decided.*

28. **Mr. Holtzmann** (United States of America) said that his delegation was reluctant to support the Mexican proposal, as it left the parties able to refer enforcement to a court, but ignored the cases in which, for example, enforcement could be achieved through a notary. The issue of entitlement to enforcement, and the issue of the vehicle for such enforcement, could best be accommodated at the end of article 15, where the enacting State had the opportunity to specify enforcement arrangements. If the term "enforceable" was problematic from the point of view of a number of languages and legal systems, he suggested that it should be deleted.

29. **Mr. Möller** (Observer for Finland) echoed the reluctance of the United States delegation to support the Mexican proposal, saying that the method of achieving enforcement was a matter for individual States' legal systems. It was better to tackle the issue of how and where enforcement would be achieved through the opportunity for the enacting State to add detail at the end of the article, or by inserting details in the Guide. He also supported deleting the term "enforceable", since if it remained in the text, each State would place its own interpretation on it.

30. **Mr. Barsy** (Sudan) said that although some legal systems did not provide for settlement agreements to be voluntarily enforceable, others did. The Commission needed to establish the conditions under which courts would have a role, and it was better to use the opportunity to add country-specific details at the end of the article in question than to adopt the Mexican proposal, as it failed to accommodate national differences in enforceability conditions.

31. **Mr. Tang** Houzhi (China) said that in the interests of expediting the Commission's work, his delegation had several observations. Firstly, it strongly felt that the term "enforceable" should not be deleted, as that would be tantamount to deleting the whole of article 15. Secondly, the issue of the term "enforceable" itself was one of form rather than substance. If the settlement agreement was treated as a contract, and there were enforcement variations, no difficulties would be created. Thirdly, as the

UNCITRAL Secretary had pointed out, the text on the table had been discussed at length by the Working Group, so changes should only be made for compelling reasons.

32. **Mr. Joko Smart** (Sierra Leone) said that he supported the United States proposal to delete the term "enforceable", as some languages and legal systems would give it one meaning, while other legal systems and languages would give it another. It was not the business of the Model Law to determine which agreements should be enforceable; that task was performed by whatever national law was applicable. China's concern at that proposed deletion was not justified: leaving the term "binding" would be sufficient, and the courts could determine what steps were needed.

33. **Mr. Jacquet** (France) said that he was very grateful for the United States delegation's suggestion in favour of deleting the term "enforceable", showing that it understood the difficulties it held for French-speaking countries. However, after some thought, the troublesome French translation "*exécutoire*" had been abandoned in favour of "*susceptible d'exécution*", which rendered the sense of "enforceable" without posing problems of interpretation.

34. **Mr. Lebedev** (Russian Federation) advocated keeping the term "enforceable" in draft article 15, as the problems of translating it into French, Spanish and Russian in a way that did not cause problems of legal interpretation seemed to have been solved. The Commission was not trying to decide how to translate the principle into action, but simply to make the principle itself obligatory.

35. **Mr. Lefebvre** (Canada) said that his delegation shared the view of the United States and other delegations of the Mexican proposal. The problem was that other public officers, such as notaries, and not just the courts, could be involved in enforcing agreements. The French proposal to use an alternative French translation of "enforceable" had his support.

36. **Mr. Meena** (India) said that before judging the words used, the Commission should look at their legal consequences. "Binding" meant "binding between the parties to the agreement", while "enforceable" referred to the fact that in cases of non-compliance, a party could go to court to force compliance. As the parties had elected to submit their dispute to conciliation, it would be pointless to go to court unless such action was unavoidable.

37. **Mr. Markus** (Observer for Switzerland) said that he agreed with the French solution of using an alternative translation of "enforcement".

38. **Mr. Holtzmann** (United States of America) said that his delegation had only suggested deleting the term "enforceable" to eliminate the problems of linguistic and legal interpretation that seemed to have arisen. If those problems had been eliminated, it was happy to withdraw its previous suggestion. It backed the Commission Secretary's proposal to replace the term "sign" in draft article 15 with the term "conclude".

39. **The Chairman** said that the original text proposed by the drafting group would be retained, but the term "sign" would be replaced with the term "conclude". The drafting committee would tackle the issue of translating the term "enforceable" in a suitable way, and explanations would be inserted in the Guide where appropriate. The Commission returned to consideration of retaining a footnote to article 15, or adding article 15 to the list of articles contained in article 3 which could neither be excluded nor varied.

40. **Mr. Jacquet** (France) said that he wished to further develop his delegation's argument for adding article 15 to the list of articles which could neither be excluded nor varied. The first argument in favour of such a step was logic. The content of article 15 as it currently stood made it unique, as it made settlement agreements between parties "binding and enforceable". Allowing it to be excluded or varied by not including it in the list in article 3 was like saying that something was obligatory in one breath, and saying that it was not obligatory in the next.

41. The second argument in favour was substance. Conciliation could have a variety of outcomes, of which genuine agreements were only one. A balance needed to be struck between leaving options open for the parties (the principle of party autonomy) and eliminating the impact of article 15. If the parties wished to consider that the settlement they had reached was not an agreement within the meaning of article 15, they should be free to state that. However, that did not mean that article 15, which did cover a substantial number of settlement agreements, should be stripped of its significance: on the contrary, it should be strengthened.

The meeting rose at 1 p.m.